



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 43 OF 2016 (O.S)

PATRICK NYAGOWA TINDO.....1ST APPLICANT

MARGARET ATIENO OGARA.....2ND APPLICANT

VERSUS

JOSEPH ONGORO OMONDI.....1ST RESPONDENT

WILLIAM OYUGI OTIENO.....2ND RESPONDENT

WILSON OJWANG OLOO.....3RD RESPONDENT

PAUL OUMA OGOLA.....4TH RESPONDENT

JUDGEMENT

1. Patrick Nyagowa Tindo and Margaret Atieno Ogara, the Applicants, filed the originating summons dated 23rd February 2016 against Joseph Ongoro Omondi, William Oyugi Otieno, Wilson Ojwang Oloo and Paul Ouma Ogola, the Respondents, seeking for the following prayers;

1. “Spent

2. Spent

3. That the Honourable Court do issue a declaration that the subdivision, sale, transfer and/or alienation of Title Numbers Siaya/Ambira/772 and Siaya/Ambira/773 by the Respondents were unlawful and void abinitio.

4. That the Honourable court do issue an order to the District Land Registrar Ukwala Registry, Ugenya District to cancel the Subdivision of Title Numbers Siaya/Ambira/772 and Siaya/Ambira/773 into Siaya/Ambira/3221, Siaya/Ambira/3222, Siaya/Ambira/3228, Siaya/Ambira/3229, Siaya/Ambira/3230 and cancel all transfers and revert title of the said suit property to the name of the original owners Ogara Tindo, Patrick Nyagowa and Ogala Tindo.

5. That the beneficiaries of the estate of the late Tindo Ogara do petition for letters of Administration intestate and that all the beneficiaries be included in the Succession proceedings of the estate of the deceased.

6. That the costs of this summon be borne by the Respondents.

2. The originating summons is based on the six grounds on its face summarized as follows;

a) That the Respondents have unlawfully and illegally intermeddled, alienated and subdivided assets of estates of deceased persons i.e. parcel numbers Siaya/Ambira/772 and 773 into parcels 3221 to 3222 and 3228 to 3230 without the Applicant knowledge or authority.

b) That the Respondents have transferred the said parcels to themselves and third parties without taking out letters of administration and/or involving all beneficiaries who have disinherited them from the land they rightly owned and reside on.

3. The application is supported by the affidavit sworn by the Applicants on the 23rd February 2016 in which they among others depone as follows;

a) That the late Tindo Ogara was the registered proprietor of Land Parcels Siaya/Ambira/772 and 773.

b) That the late Tindo Ogara had before his death bequeathed land parcel Siaya/Ambira/772 to the household of Teresia Ojwang'a and parcel Siaya/Ambira/773 to the that of Regina Odemba. That during adjudication land parcel Siaya/Ambira/772 was registered in the names of the sons of Teresia Ojwang'a, while parcels Siaya/Ambira/773 was registered in the names of the sons of Regina Odemba. The deponents annexed copies of the register for land parcels Siaya/Ambira/772 and 773 that show the following;

- That Siaya/Ambira/772 was on first registration on the 22nd June 1976 registered in the names of Ogola Tindo, Patrick Nyagowa and Ogala Tindo.
- That Siaya/Ambira/773 was on first registration on the 22nd June 1976 registered in the names of Ezekiel Omondi, Otieno Tindo and Alloice Ogara.

c) That The Respondents have fraudulently and/or illegally registered themselves as the owners of the suit Lands, Siaya/Ambira/772 and 773, without the knowledge and consent of some of the beneficiaries who were not included as registered owners contrary to the Law of Succession.

d) That the action by the Respondents has resulted in some of the beneficiaries and/or their children being disinherited of their father's properties.

e) That the Respondents have fraudulently registered some of the parcels subdivided from the suit property in the names of third parties and other subdivisions are claimed by some strangers causing confusion and anxiety between the beneficiaries and the claimants to the said properties.

4. That the learned counsel for the Applicants filed written submissions dated 14th September 2018. That when the matter came up for mention on the 18th September 2018, the 2nd and 4th Respondents, who had appeared in Court for the first time and had not filed any appearances or replying affidavit, informed the court that they did not intend to file any submissions. The application was therefore fixed for judgment.

5. The following are the issues for the court's determinations;

a) Whether the suit properties that is, Siaya/Ambira/772 and 773 were first registered in the names of Ogara Tindo, Patrick Nyagowa and Ogala Tindo.

b) Whether the transmission of the said parcels has been done in accordance with the provisions of the Laws of Succession Act Chapter 160 of Laws of Kenya.

c) Whether the orders sought should be granted.

d) Who pays the costs.

6. The court has carefully considered the grounds on the originating summons, the affidavit evidence and the annexures thereto, the submissions by counsel and come to the following conclusions;

a) That from the deposition of the Applicants and the documentary evidence availed, the 1st Applicant, Patrick Nyagowa, is a son to Teresia Ojwang'a who was one of the widows of the late Tindo Ogara, and his name appears as one of the three registered proprietors of Siaya/Ambira/772. That on the other hand, the second Applicant, Margaret Atieno Ogara, is the wife of Alloyce Ogara Tindo who is a son to Regina Ademba Ogara, who was also a widow to the late Tindo Ogara. That the said Alloyce Ogara Tindo is one of the three registered proprietors of Siaya/Ambira/773 and is reportedly unwell.

b) That though the learned counsel for the Applicants submitted that the late Tindo Ogara died on the 14th March 1943, there is no supporting document availed in form of a death certificate and further the Applicants did not depone to that fact in their supporting affidavit.

c) That further, though the Applicants have deponed that land parcels Siaya/Ambira/772 and 773 were registered in the name of the late Tindo Ogara and that before his death he had bequeathed each of the parcels to the household of the 1st and 2nd wife respectively, there is no documentary evidence from the Registrar of Lands or Land Adjudication Officer confirming that Tindo Ogara had ever been registered with any of the suit properties.

d) That as the two parcels of land had never been registered in the name of Tindo Ogara, who according to the learned counsel for the Applicants died in 1943, which is long before land adjudication and registration, the two properties never formed part of his estate. That should the position of the Applicants be that those registered with the suit properties on first registration or subsequently thereafter, were so registered through fraud, illegally, unlawfully, irregularly and or unprocedurally, and that the registration ought to have been in the name of Tindo Ogara, then they need to obtain letters of administration to enable them file suit to recover the properties for the benefit of the estate. That should any of the beneficiaries of the state of the late Tindo Ogara feel that he/she has been left out of their rightfully shares, and that those registered with the suit land on first registration were so registered as trustees under customary law, then they may move the court for appropriate redress.

e) That the 1st Applicant and the husband to the 2nd Applicant, being among of those registered as proprietors of the two parcels of land would ordinarily be expected to have not only given authority and consent, but also to have actively participated in the subdivisions and transfers of the parcels and their registrations. That should there be any subdivision, transfer or registration that has been undertaken by the other registered co-proprietors without their consent, authority and participation, then they have the option of reporting to the police for appropriate investigations with a view of criminal proceedings being initiated and or file a suit challenging the same.

f) That the applicants did not avail copies of the registers and or certificates of official searches of the parcels subdivided from land parcels Siaya/Ambira/772 and 773 and the court is therefore unable to confirm that any such subdivision has been registered in the names of third parties.

7. That flowing from the foregoing, the court finds that the Applicants have even without the Respondents defending this suit, failed to prove their claim on a balance of probabilities. The court therefore orders that;

a) The claim commenced through the originating summons dated the 23rd February 2016 and filed on the 2nd March 2016 be and is hereby dismissed with no orders as to costs.

b) The file be and is hereby closed.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 14TH DAY OF NOVEMBER 2018

In the presence of:

Applicants Present

Respondents 2nd Respondent present

Counsel M/s Adwar for Mugoye for Applicants/Plaintiffs

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE